

NOVEMBER 30. 1764.

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Unto the Right Honourable, the Lords of Council and Session,

T H E
P E T I T I O N

O F

42

ALEXANDER HAY wright in *Edinburgh*;

Humbly sheweth,

THAT a work-house, and some other tenements on the west side of *Mary King's Close*, and to the north of the *Writers Court* in *Edinburgh*, belonged to *James Macculloch* taylor in *Glasgow*; he was also proprietor of a yard and area immediately to the north and north-east of these subjects. As the petitioner had formed a scheme of building a handsome house upon that area, consisting of several floors, he was desirous of purchasing the whole from Mr. *Macculloch*, but at that time Mr. *Macculloch* would not part with the north yard, or area. The petitioner however agreed with him as to the purchase of the area lying to the south thereof; and as he intended immediately to build upon it, he made it a condition of the bargain, that he should have a servitude *altius non tollendi*, in the strictest sense, upon the above mentioned north yard.

This servitude was necessary to the petitioner, for the following reason; as he had laid his plan to build out from the east gavel of his new tenement, so as to form, in some degree,

degree, two sides of a square; the north area was necessary for prosecuting this scheme, and by burdening it with this strict servitude, *altius non tollendi*, it became of no value to any body but himself, which consequently secured him of the purchase.

March 26.
1760.

According to this agreement, Mr. *Macculloch*, of this date, disposed to the petitioner the subjects on the south side of the north yard, with a servitude thereon, which stands thus expressed in the disposition, "together with a servitude *altius non tollendi* upon the remaining part of the said tail, or piece of waste ground still belonging to me, and lying upon the north side of the subjects hereby disposed, that no building shall be erected thereon, more or higher than what is already built upon the same, in all time coming."

November
1760.

The petitioner soon after this built upon the subjects so disposed, a good house, consisting of five different floors, or stories; and of this date, he sold the third floor of this house to *James Robertson* mason, defender in the present process.

This bargain was not concluded in a slump manner, for a sum of money; but, in order to accommodate Mr. *Robertson*, whom he looked upon at that time as his friend, the petitioner agreed to ask no more than a proportional price of the value of the area, and that he should be reimbursed in the expence of the mason and wright-work, which should be furnished by him at the ordinary prices. As the petitioner then expected, and has since made considerable profit by the erecting of this tenement, it cannot be denied, that the disposing of part of it to Mr. *Robertson* in the above mentioned manner, must have been considered as a favour.

As the petitioner was at that time in a manner certain of acquiring soon the north yard above mentioned, and thereby of completing his original plan; and as all Mr. *Robertson* could ask in reason, was to have light secured to his house, therefore it was understood and agreed betwixt them, that



that the servitude which the petitioner had acquired should be restricted to Mr. *Robertson*, so as to intitle him not to prevent any building whatever higher than what had been raised before that time, but only to restrain and provide against what might deprive the third floor, then disposed, of proper and sufficient light.

Accordingly the disposition by the petitioner to Mr. *Robertson* contains this clause, "together with a servitude *altius non tollendi* upon the remaining part of the waste ground still belonging to the said *James Macculloch*, upon the north side of the said new dwelling-house, and upon the area belonging to me on the south side of the new-built tenement, and betwixt it and the north wall of my present work shop, which area is seventeen foot broad, or thereby, betwixt the said walls, so that no building shall be erected thereon in all time coming, *so as to hurt or pre-judge the lights of the dwelling-house hereby disposed.*"

The good correspondence between the petitioner and Mr. *Robertson* did not continue long after this transaction; there had arisen some little differences about their accompts; and Mr. *Robertson* had applied to the petitioner for as much ground in the south area, as would be sufficient for a cellar to his floor, which originally had none: The petitioner did not promise, but intended to grant his request; but luckily having got information that Mr. *Robertson* proposed to use his liberty not for a cellar, but for a cow-byre, which must have proved a nuisance to the whole tenement, he gave an absolute refusal; upon which a complaint was made to the arbiters who had been chosen to adjust the accompts: The arbiters, upon Mr. *Robertson's* owning his scheme of the cow-byre, gave it as their opinion, that the indulgence was not to be granted.

Mr. *Robertson* upon these accounts has conceived such an ill-will against the petitioner, that since that time it would seem, that his principal intention has been, to do every thing

thing in his power which can contribute to Mr. *Hay's* inconvenience or prejudice.

Accordingly when the petitioner, in consequence of his original scheme, made a purchase of the above mentioned north yard from Mr. *Macculloch* in May 1763; Mr. *Robertson*, out of pure ill-humour, raised the price, by offering much more than it was worth to any person but the petitioner, as he alone had the power of erecting any farther buildings upon it; and indeed he was certain that he could not lose much by this offer, as he knew the petitioner was resolved to have it, and that to him who was not limited, it was of considerable value.

After the purchase of the north yard, the petitioner applied to the guild court, for a warrant to build upon the east part of it, so as that the front of the intended building should run in a line with the east gavel of the new tenement, according to a plan which he gave in.

Unfortunately for Mr. *Hay*, it happened that Mr. *Robertson* the defender, was at that time, and still is a member of the Dean of Guild's court; and altho' the petitioner, to avoid disputes, offered to circumscribe his proposed building, so as not to raise it above the level of Mr. *Robertson's* windows, and, consequently, to leave him even a free prospect; yet the defender thought proper to oppose the raising of any building whatever, and prevailed upon the court, of this date, to pronounce the following judgment: "Find, that
 " the petitioner has no right to erect any building on the
 " area in question, more or higher, than at the time the
 " said *James Macculloch* granted the foresaid disposition to
 " him, with the right of servitude therein mentioned, which
 " he afterwards conveyed to the defender: Therefore refuse
 " the desire of the petition, and decern."

Feb. 15th,
1764.

The petitioner, upon this, having presented a bill of advocacy, it [was] past by one of your Lordships number; notwithstanding of the most strenuous opposition made by
 Mr.

Mr. *Robertson*. However, the reasons of advocacy having come to be discussed before the Lord *Elliock* Ordinary, his Lordship was pleased, of this date, "To repel the reasons of advocacy, and remit the cause in common form;" and, upon a representation being offered, to adhere by the following interlocutor: "Having considered this representation, with the answers made thereto for *James Robertson*, refuses the desire of the representation, and adheres to the former interlocutor."

July 4th,
1764.

Nov. 16th,
1764.

Of these judgments the petitioner humbly begs a review. He shall, in the first place, state what appears to him the foundation of his own plea, and shall afterwards endeavour to answer the objections which have been made by the defender.

In establishing his plea, it will be necessary, 1st, To enquire what the petitioner was originally intitled to; and then, what he disposed of.

There is no doubt, but by the clause in the disposition from Mr. *Macculloch*, Mr. *Hay* acquired a strict servitude *altius non tollendi*, upon the north yard; and a power of prohibiting any farther building to be erected upon it without his consent, nor was he obliged to give any reason for refusal.

After this power was once acquired by the petitioner, and established in his person, it cannot be doubted, that he was intitled to make what use of it he should chuse; he might discharge or retain it, or dispose of it in whole or in part to whom he should think proper. He certainly might give a title to any disponsee, either to exerce the servitude to its full extent, over the half of the area subjected to it, or to have the privilege of the servitude in a lesser and more limited degree over the whole of the area; nor can the petitioner think, that such disponsee could pretend to go beyond the limits which had been set to his privilege.

B

This

This strict servitude *altius non tollendi*, limited by the clause, *that no building shall be erected thereon, more or higher than what is already built upon the same, in all time coming*, is considered by the Roman lawyers, and is in the nature of the thing itself a *genus*, containing within it the two lesser servitudes or species's of *prospectui ne officiatur*, and *luminibus ne officiatur*; and, undoubtedly, other modifications of a servitude may be easily supposed likewise to fall within it.

It is agreed, that of these, the most confined and restricted is *luminibus ne officiatur*; and the servitude of a prospect is allowed to be more extensive. *Latior pleniorque de prospectu, quam de luminibus, servitus est*; Voet. lib. 8. tit. 2. p. 12. ad ff. And the same is observed, l. 15. ff. *de servitutibus prædiorum urbanorum*. *Inter servitutes ne luminibus officiatur, et ne prospectui offendatur, aliud et aliud observatur: quod in prospectu plus habet, ne quod ei officiatur ad gratiorem prospectum, et liberum: in luminibus autem non officere, ne lumina cujusquam obscuriora fiant.*

The petitioner having acquired, as has been mentioned, from Mr. Macculloch, the servitude *altius non tollendi*, in its full extent; and, consequently, the servitudes *prospectui et luminibus ne officiatur*, and other modifications of it; he chose to dispoise to the defender the servitude *luminibus ne officiatur*, and to give him no power of challenge, as long as his light remained unprejudiced. This Mr. Hay surely had a right to do, and the disposition is worded as accurately as if it had been written by the most acute lawyer. The words are, this servitude *altius non tollendi*, is conveyed, "So that
"no building shall be erected thereon, in all time coming, so as
"to hurt or prejudice the lights of the dwelling house hereby
"dispoised."

The natural distinction between the servitudes is here alluded to, and 'tis impossible to conceive how it should be more precisely expressed, that the servitude *luminibus ne officiatur*,

ficiatur, was only disposed to the defender, which was a part of, and contained in the servitude *altius non tollendi*, which had been acquired from Mr. *Macculloch* by the petitioner.

It will remain only, in order to establish Mr. *Hay's* plea, to consider in what this servitude, *luminibus ne officiatur*, consists, which was thus disposed to Mr. *Robertson*.

The natural meaning of the words are plain, that the light should not be prejudged, and nothing more is required. But if authority was necessary for explaining so simple a matter, the extent of this servitude has been ascertained by decisions, both in the *Roman* law, and in ours.

In the *first* place, it is agreed, as has been mentioned, that this servitude is more restricted than that of a prospect. *2dly*, It is laid down as a rule, that no building which is not above the level of the window, can be restrained by this servitude. *Lumen, id est, ut cælum videretur, et interest inter lumen et prospectum: lumen ex inferiore loco esse non potest: l. 16. ff. eod. tit.* and this doctrine is established by all the commentators. *3tio*, It is not pretended, that any thing is contained in this servitude, but the privilege of enjoying light sufficient for necessary use in a strict sense; and it is allowed, that even the exclusion of the sun, if light be left, cannot be complained of by a person possessed of this servitude. Accordingly, *Voet* says, *ad ff. B. 8. tit. 2. p. 11. Constituta servitute ne luminibus officiatur.* And a little after, *Unde si id quod a vicino ponitur, lumen quidem non impediat, solem tamen auferat, nihil contra hanc servitutem fieri censetur.* And, in *l. 17. ff. eod. tit.* speaking of the same servitude, it is said, *Si tamen quod ponitur, lumen quidem nihil impediat, solem autem auferat: si quidem eo loci, quo gratum erat, eum non esse: potest dici, nihil contra servitutem facere.*

Our law has followed, or rather gone beyond the civil law in restricting the interpretation of this servitude. In a
declarator

declarator of *servitus luminum*, the Lords decerned, " That, notwithstanding such a servitude, the defender might build any thing he pleased, and to what height he pleased, at an ell's distance, whereby the light would be free; and that he was not obliged to keep at a greater distance, even in the country. *Fountainhall, 5th February 1678, Ogilvie contra Donaldson.*

It appears then clearly in what acceptation the servitude *luminibus ne officiatur* is held, both by the *Roman* law, and by ours; and that, in the present case, the defender could not, in consequence of that servitude, which was certainly the only one granted, hinder the petitioner from raising his intended building as high as he chuses, as the front of it only runs in a line with the gavel of Mr. *Robertson's* house, and so cannot encroach, in any degree, upon his lights. By the decision above mentioned, the petitioner could even raise up a building within a yard of the front of Mr. *Robertson's* house; but certainly, to form another side of a square, running at right angles upon the end of Mr. *Robertson's* gavel, cannot be denied him.

The petitioner having considered the extent of the right which he disposed to the defender, will now proceed to take notice of the objections made to his plea, and will endeavour to show, that they are without any solid foundation.

Objection. *1mo*, It is insinuated, that the affair was left entirely to Mr. *Hay's* writer, and that Mr. *Robertson* did not attend much to the matter.

Answer. The deed was not executed in any hurry; it was fully and seriously canvassed and deliberated upon; and it is well known, that Mr. *Robertson* is not a man to leave his affairs to the care of others, or allow himself to be imposed upon through inattention.

Objection. *2do*, It is mentioned as a thing absolutely impossible to have been intended, that the servitude obtained by Mr. *Hay* should be restricted when disposed to the defender; and

and that the words must be extremely clear to make such an intention probable.

The petitioner would apprehend, from what has been said, that it is extremely probable this restriction was intended by both parties, as granting the servitude to the defender in a higher degree than it is circumscribed by the last part of the clause, would have answered no reasonable end to Mr. *Robertson*, and only given him an opportunity of gratifying his resentment and ill humour.

Answer.

Mr. *Robertson* would not have given himself so much trouble, after the dispute, to hinder the petitioner from obtaining the purchase of this area, had not he known that the petitioner intended, and had a right to build upon it; and that a very profitable scheme would be marred if he should fail in the execution.

It appears likewise, from the following circumstance, that Mr. *Robertson* did not understand that the right acquired by him, intitled him to prohibit any building whatever upon the area in question. Mr. *Robertson* has a servitude upon the area south of his house, *that nothing should be erected there to hurt his lights, or entry into his house*. This is contained in the same clause with the servitude upon the north area, and expressed in the same words, and no distinction can surely be supposed between them; yet, in consequence of this, the defender did not pretend to prohibit the erection of some buildings raised upon that south area by the petitioner.

3tio, It is argued by the defender, "That, by an after clause of the disposition, the petitioner assigns him to all the writs, evidents, and securities, granted and conceived in favours of him and his authors concerning the subjects, referring to a particular inventory signed by himself, the 28th article of which specifies the disposition from Macculloch to him, as containing a servitude, *altius non tollendi, &c.*" And from this it is argued, that the servitude is assigned, as being contained in the writing, and without any restrictions.

Objection.

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Answer.

The defender is pleased, in this argument, to confound the disposition of a right with the assignation of a writing in security of that right, which surely have no connection together. The assignation of Mr. *Macculloch's* disposition, containing a broader servitude than what was conveyed to the defender, was intirely in security; and the servitude acquired by him, can never be explained by such writings assigned in security: He might, with the same reason, pretend, that he had a right to the whole five stories of the new tenement, because he was assigned to the only rights which the petitioner had thereto, altho' the petitioner had only expressly disposed to him the third story. Were this argument to be listened to, that every thing contained in a writing assigned in security, was to be presumed to be conveyed to the assignee, it would produce very considerable alterations in property; and indeed, it is so evidently without any foundation, that it would be improper to say more upon the subject.

Objection.

4^{to}, It is objected, that the words in the disposition to the defender, are not sufficiently clear; and that even the privilege allowed to him by the restriction, will be encroached upon by the intended buildings, as the smoke will be blown in upon his windows.

Answer.

The clearness of the expression appears from the clause itself; and it has been already shown, that much more material objections than smoke are not prohibited by a servitude, *luminibus ne officiatur*; but, was such a prohibition to be understood, the defender would gain nothing in that article, as, at the time of Mr. *Macculloch's* disposition to him, there were some buildings upon the area in question, which certainly may be kept up, and which will send out as much smoke as those that are intended by the petitioner.

5^{to}, It

5to, It is objected by the defender, that every purchaser of any part of the new tenement had a right to the servitude acquired by the petitioner, and which could not be passed from without a very express declaration to that purpose. Objection.

Mr. *Hay* humbly apprehends, that the power of exerting the servitude acquired from Mr. *Macculloch*, belonged entirely to him; and that a purchaser of any part of his new tenement had no title to it, without an express conveyance: But were the case otherways, he does not see how this right could be more clearly passed from than it has been by the defender. Answer.

6to, It was said, that the price was too high, if it had been supposed, that the servitude *altus tollendi* was not conveyed in its full extent to Mr. *Robertson*. Objection.

The petitioner is extremely willing to repay Mr. *Robertson* his price, upon his giving up the house, and to give him besides 20 *l. sterling* of profit; and he has no expectation that this offer will be accepted of, as he firmly believes Mr. *Robertson* will get 60 *l.* of profit, whenever he chuses to dispose of his house. Answer.

7mo, It is pleaded by the defender, that by this intended building, his house will be deprived of its prospect, and of the morning sun. Objection.

In the *first* place, it has been shown, that the servitude conveyed to the defender, contains a privilege of light, but neither of prospect, nor of the morning sun. 2dly, The damage which he would suffer in these articles, would be very immaterial, even were the intended building raised above his house, as the front of it (as has been mentioned) runs in a line with Mr. *Robertson's* gavel. But, 3dly, To avoid all disputes, if your Lordships should have any doubt, that the petitioner has not a right to raise the intended building to what height he pleases, let him be restricted not to build above the level of Mr. *Robertson's* windows; Answer.
but

but he hopes that your Lordships will not think him obliged to make this concession.

Objection. 8vo, and *lastly*, It was much insisted upon by the defender, that if the petitioner's scheme takes place, he will be in constant dread and apprehension of fire, for that one of the intended buildings is for Mr. *Hay's* work-house, which is, of itself, a dangerous neighbour; and that besides, it is near a lint manufactory, than which there is nothing easier kindled.

Answer. This danger from fire is plainly exaggerated from mere affectation: The intended work-house is to be at least 20 feet distant from Mr. *Robertson's* house, with a stone gavel between them, without any windows, and the side walls built of brick; whereas, the petitioner's present work-house, is within six or eight feet of the defender's house, is only built of lath and plaister, and is joined by a wooden shade which touches the wall, and comes within a foot of Mr. *Robertson's* window. It is not pretended that the defender can remove the present work-house; it is needless to observe, from which of the two there is the greatest danger.

Besides, Mr. *Hay* might make a work-house of the buildings existing at the period of the acquisition of the servitude upon the north area, which, at the time of Mr. *Robertson's* purchase, were inhabited by a brushmaker, a more dangerous neighbour, and whose house is filled with more combustible materials than a wright; but the prodigious danger from the neighbourhood of a wright's work-house, is altogether imaginary, and can never happen without great inattention; the petitioner will at least suffer first, as his dwelling-house is to be between his work-shop and Mr. *Robertson's* house.

But these objections are mostly raised of late, and were not mentioned in the guild court, the interlocutor in which proceeded entirely upon the import of the dispositions.

So desirous was the petitioner from the beginning of this affair to avoid disputes, that he did not insist upon his full right,

right, but offered to the defender to raise his intended building no higher than equal to the level of his windows. By this proposal, not only the light and the sun, but the prospect, to which the defender had no right, would have been saved. The petitioner likewise offered to submit the whole affair to the defender's own council; both these proposals were rejected by Mr. *Robertson*, who is actuated by nothing but resentment for the supposed injury, which he had received from the petitioner.

It will not be perhaps improper here to mention some other circumstances, which show, that ill humour was Mr. *Robertson's* principal motive for this opposition. He endeavoured to persuade Mr. *Macculloch*, that the petitioner, by his intended building, would prejudice the light of the adjoining houses belonging to Mr. *Macculloch*; but upon shewing Mr. *Hay's* plan, this matter was easily accommodated. The defender likewise insisted for the taking away a temporary wooden cellar erected in a corner of the court by the petitioner, upon this pretence, that it had been put up without a warrant from the court of guild, altho' it was declared, that he might erect it again upon obtaining a proper warrant.

And it appears most plainly, that all the objections and arguments raised by the defender, are affected and without foundation, from this single circumstance, that he is only possessed of the third story, whereas, the petitioner himself, has retained the property of the first and second flats. If this intended building was to do any prejudice, it would certainly be hurtful in a much stronger degree to the lower flats, than to the higher; and as the petitioner continues proprietor of the two undermost stories, it is not to be supposed, that he would be very keen in prosecuting a scheme hurtful to his own property.

There was another gentleman who had purchased a story in the same land, and who, by the inadvertency of the

petitioner, was secured in a much higher servitude than Mr. *Robertson*; this gentleman seeing how invidious it would be to insist upon it, voluntarily gave up his claim, and has allowed the petitioner a liberty to follow out his scheme without opposition.

Upon the whole, it appears clearly, that altho' the petitioner acquired from Mr. *Macculloch* a servitude, *altius non tellendi* in general, yet he only conveyed to the defender the servitude *luminibus ne officiatur*; consequently, was it hurtful to the defender, he could not prohibit the petitioner from following out his scheme: But it is evident, that no real damage will be done to Mr. *Robertson* by this intended building; and that his opposition proceeds plainly from resentment and ill humour.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutor, and to find, that the petitioner has a right of raising buildings upon the above mentioned area to what height he pleases; or, at any rate, to find, that he cannot be stopped in erecting any building, which shall not be higher than the level of the defender's windows.

According to justice, &c.



JA. FERGUSON, Junior.